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No. 08-292

Supreme Court, U.S.
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In The

Supreme Court of the United States

DARYL DAHLQUIST,

Petitioner,

v.

CITY OF KENT, WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington

PETITION FOR REHEARING

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253-631-2906

PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner respectfully petitions this Honorable Court for rehearing.

Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on November 10, 2008, and (2) granting the petition.

In 1969 this Court made a historical decision that "the Court must accept as true all well pleaded allegations of fact and view them in the light most favorable to the petition." *See Jenkins v. McKiethen*, 395 U.S. 411, 421-422 (1969).

To invoke jurisdiction of Federal Court, litigant must have suffered, or be threatened with actual injury traceable to Respondent and likely to be redressed by favorable judicial decision, U.S.C.A. Const. Art. 3, s. 1 *et seq.*

STATEMENT OF SUBSTANTIAL GROUNDS OF A CONTROLLING EFFECT (Rule 44.2)

The definition of retaliation under ADA is broad:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding

> or hearing under this Act 42 U.S.C. section 12203 (a).
>
> Notice the wording:
>
> > no person shall discriminate against any individual because such individual . . . made a charge, testified . . . in any manor . . . under this act.

This petition for review comes down to this controlling statement noted by Respondents at page 2 under subheading, "B. Prior lawsuit and trial" in the "City of Kent's response to petition for review" dated 10-16-07. The statement reads:

> "In addition, Mr. Dahlquist claimed the City should have handcuffed him with his hands in front, rather than behind his back.
>
> During the trial of the particular lawsuit, various Kent Police Officers and City Jail staff testified they had never seen such a bracelet." App. 1.

Why were they all testifying about Dahlquist's medical alert bracelet? There is nothing in the discovery litigation process that took place prior to trial, and nothing in the original charge itself were "Mr. Dahlquist claimed the City should have handcuffed him with his hands in front, rather than behind his back."

Remember the Respondents said that "During the trial of the particular lawsuit, various Kent Police Officers and City Jail staff testified they had never

seen such a bracelet." And yet as found months later as noted in Appendix 1 there it is Dahlquist's medical alert bracelet as seen on his right wrist.

On May 18, 2003, Dahlquist found a copy of his January 29, 1997 mug shot picture as taken by Harvey Wenderski at the Kent City Jail in a box of papers his attorney gave him on a single piece of paper actual size shown in Appendix 1.

On January 29, 1997, when Dahlquist was taken into custody that day and transported to the Kent City Jail as testified by Dahlquist the handcuffs were placed on his hands in the front position at all times and there is nothing in the record were Dahlquist ever "claimed the City should have handcuffed him with his hands in front, rather than behind his back."

It is to be declared positively that since June 25, 1993, Dahlquist has never since then been handcuffed at any time since June 25, 1993 with his hands being placed in handcuffs behind his back. Handcuffs were always placed on his hands in the front position from that day on to the very present.

NOW if no one can produce the source of the statement "Mr. Dahlquist claimed the City should have handcuffed him with his hands in front, rather than behind his back" then the statement is a false statement the only purpose of which is to mislead the court about the truth (a ruse used to destroy Dahlquist's credibility when his credibility wasn't an issue) and Dahlquist acknowledges that retaliation in

the form of perjury is a very effective form of discrimination as is noted by the following.

On January 25, 2003, Dahlquist telephoned one of the juror's at his ADA trial a man named Donald Bonds and asked him the following question:

> Dahlquist. "I would like to ask you a question?"
>
> Jurist. "OK."
>
> Dahlquist. "The issue with the medical alert bracelet. How did that affect you?"
>
> Jurist. "I don't want to talk about it."
>
> Dahlquist. "That's OK, because I turned them into the Mayer's Office for perjury."
>
> Jurist. "You threatening me?"
>
> Dahlquist. "No, I just wanted to ask you about the medical alert bracelet."
>
> Jurist. "Hey, buddy. You got just what you deserved."

App.'s brief, p.25-26. CP 139.

Please incorporate herein by reference as if set forth in full the case of *Kroske v. US Bank Corp.*, 04-35187 (9th Cir. 2005).

The State common law privilege or immunity for witness testimony does not override federal statutory law condemning retaliation under the Americans With Disabilities Act.

The Defendants claim that they are immune from an action under the Americans With Disabilities Act because of the existence of a state common law immunity which protects witnesses who are participants in litigation. The Ninth Circuit Court of Appeals does not share this opinion.

The Ninth Circuit recognizes the priority given the Supremacy Clause of the United States Constitution, Article IV, which gives Congress the power to preempt state and local laws. *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 667 (9th Cir. 2003). The Ninth Circuit continues to support the proposition that federal interests will prevail where state law "stands as an obstacle to the accomplishment of the purposes or objectives of Congress." *Pardi v. Kaiser Foundation Hospitals*, 389 F.3d 840, 851 (9th Cir. 2004). An example of this preemption is found in a 42 U.S.C. § 1983 case where the Ninth Circuit held that California's statutory litigation privilege would not bar an action under that Federal Civil Rights Act, 42 U.S.C. § 1983. *Pardi*, *supra,* citing *Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996). The Court in *Kimes* observed that federal courts will not allow a state immunity defense to have the effect of transmuting "a basic guarantee into an illusory promise; and the supremacy clause of the Constitution ensures that

the proper construction may be enforced." *Kimes*, *supra*, at 1127, cited by *Pardi*, *supra*, at 851.

The Court in *Pardi* applied the rationale of *Kimes* to an ADA proceeding. That Court noted that it was not alone in imposing this kind of restriction upon application of state law. *Id.* at 851. In *Pardi*, the Court reversed summary judgment which was granted based on claims that the defendant was entitled to litigation immunity under California law for retaliatory and discriminatory acts pursued under the ADA. As the commissioner stated on June 5, 2007:

> In light of *Briscoe*, which Dahlquist did not acknowledge in his opening brief, and the lack of any provision in the ADA even remotely suggesting that the ADA abrogates witness immunity,[1] Dahlquist's appeal is very nearly frivolous. But his argument that federal law may preempt the privilege is not frivolous and there is no case dealing directly with application of the witness privilege to the ADA. Resolving all doubts in Dahlquist's favor, the appeal will not be characterized as frivolous. Kent's request for an award of attorney fees on appeal on the ground of frivolity is therefore denied.[2]

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[1] *See* App. 2 of this brief.

[2] *See* App. 9 of the Petition for Writ of Certiorari filed in this matter.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Writ of Certiorari, the petition for rehearing should be granted and the petition reconsidered.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

DARYL DAHLQUIST
Petitioner, Pro se

App. 1

The Commissioner's ruling was based in substantial part upon the U.S. Supreme Court decision in *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). App. 5 through App. 6. That case held that the common law witness privilege, in existence in 1871 at the time of enactment of 42 U.S.C. § 1983, applied to Civil Rights cases. *Briscoe* affirmed a ruling of the Seventh Circuit that witnesses were absolutely immune from damages in a 42 U.S.C. § 1983 case. On the other hand, the Seventh Circuit did not extend its ruling in *Briscoe* to ADA claims. *Steffes*, supra.*

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* *See* page 8 of the Petition for Writ of Certiorari filed in this matter.